Supreme Court, U.S.
FILED

No. 03-

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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

WIEN & MALKIN LLP as Supervisor and PETER L. MALKIN, individually and as Partner in and on behalf of EMPIRE STATE BUILDING ASSOCIATES, EMPIRE STATE BUILDING COMPANY, FIFTH AVENUE BUILDING ASSOCIATES, 200 FIFTH AVENUE ASSOCIATES, NAVARRE-500 BUILDING ASSOCIATES, 500-512 SEVENTH AVENUE ASSOCIATES, MARLBORO BUILDING ASSOCIATES 1359 BROADWAY ASSOCIATES, 112 WEST 34TH STREET ASSOCIATES, 112 WEST 34TH STREET COMPANY, SEVENTH AND THIRTY SEVENTY BUILDING ASSOCIATES, 501 SEVENTH AVENUE ASSOCIATES, 60 EAST 42ND STREET ASSOCIATES, LINCOLN BUILDING ASSOCIATES, 250 WEST 57TH STREET ASSOCIATES, FISK BUILDING ASSOCIATES, 1333 BROADWAY ASSOCIATES and 1400 BROADWAY ASSOCIATES,

Petitioners,

v.

HELMSLEY-SPEAR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION – FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040 (June 2, 2003) (*per curiam*), this Court expressly rejected the view that the Federal Arbitration Act ("FAA") applies only to transactions which have a "substantial effect on interstate commerce", holding that the FAA applies to any transaction "affecting commerce". In a December 5, 2002 Decision and Order, however, the Supreme Court, Appellate Division, of the State of New York made the same error as the Alabama court in *Citizens Bank*: the court expressly refused to apply the FAA to a dispute involving the operation of major commercial properties in New York City, including the Empire State Building, because "the dispute at issue . . . does not have a substantial effect on interstate commerce". The New York court therefore declined to consider whether an arbitration award relating to those properties—an award the court itself recognized was "perhaps questionable"—was in "manifest disregard of the law", one of the bases for vacatur under the FAA; rather, the court confirmed the award because the court believed the award was not completely irrational, the applicable standard under state law.

The question presented is whether the Court should grant certiorari, vacate the judgment below, and remand the case for further consideration in light of *Citizens Bank*.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	1
Statement of the Case	2
Reasons for Granting the Petition	7
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases

Alafabco, Inc. v. Citizens Bank, 2002 WL 1998268 (Ala., Aug. 30, 2002) 8

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 8

Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (June 2, 2003) (*per curiam*) ..... i, 8, 9

In re Application of Spear, Leeds & Kellogg v. Bullseye Securities, Inc., 291 A.D.2d 255, 738 N.Y.S.2d 27 (1st Dep't 2002) 10

In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, LLC, 294 A.D.2d 245, 744 N.Y.S.2d 364 (1st Dep't 2002) 10

Katzenbach v. McClung, 379 U.S. 294 (1964) 9

New York Telephone Co. v. Communications Workers of America Local 1100, 256 F.3d 89 (2d Cir. 2001) 8

Security Pacific Mortgage & Real Estate Servs., Inc. v. Canadian Land Co., 690 F. Supp. 1214 (S.D.N.Y. 1988) 4

Cited Authorities

	Page
Stewart Tabori & Chang v. Stewart, 282 A.D.2d 385, 723 N.Y.S.2d 492 (1st Dep't 2001)	10
United States v. Lopez, 514 U.S. 549 (1995)	8
Statutes	
9 U.S.C. § 2	1
28 U.S.C. § 1257(a)	1
28 U.S.C. § 2106	1

TABLE OF APPENDICES

Page

Appendix A — Decision And Order Of The Supreme Court, Appellate Division, First Department Entered December 5, 2002 ..... 1a

Appendix B — Judgment Of The Supreme Court Of The State Of New York County Of New York Filed July 23, 2001 ..... 3a

Appendix C — Partial/Final Award 10a

Appendix D — Order Of The State Of New York, Court Of Appeals Denying Motion For Leave To Appeal Dated April 8, 2003 ..... 15a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court, Appellate Division, of the State of New York in this case.

OPINIONS BELOW

The Arbitration Panel's "Partial/Final Award" (the "Award") (Appendix 10a-14a) is not otherwise published. The trial court's opinion (per Gammerman, J.) granting respondent's motion to confirm the Award (Appendix 3a-9a) is not otherwise published. The Supreme Court, Appellate Division, First Department's Decision and Order affirming confirmation of the Award (Appendix 1a-2a) is published at 300 A.D.2d 32, 751 N.Y.S.2d 21.

STATEMENT OF JURISDICTION

The New York Court of Appeals denied petitioners' motion for leave to appeal on April 8, 2003 (Appendix 15a-16a). This order is published at 99 N.Y.2d 511. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a) and § 2106.

STATUTORY PROVISION INVOLVED

This petition for certiorari involves the Federal Arbitration Act of 1947, 9 U.S.C. § 2, which provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole

> or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This case involves critical issues relating to the management and operation of more than eight million square feet of commercial real estate in New York City, including global destination properties such as the Empire State Building and the International Toy Center. Indeed, the Arbitration Panel (the "Panel") whose award is under review itself recognized that the case is "of enormous importance not just to the parties but to a significant portion of the New York City business community" (R. 100).

The properties are owned and operated by partnerships/ LLCs that were created in the 1950's and 1960's by Lawrence A. Wien, the founder of petitioner Wien & Malkin, LLP ("Wien Malkin") and his son-in-law Peter L. Malkin, the current Chairman of Wien Malkin. The partnership agreements for these entities provide that Wien Malkin will have an ongoing supervisory role in partnership affairs, and recognize the original Helmsley-Spear, Inc. ("Helmsley-Spear" or "respondent") as managing agent of the properties (*e.g.*, R. 927). The agreements also provide mechanisms for the partners to terminate Helmsley-Spear, in some cases "for cause" and in others "without cause". (*E.g.*, R. 962, 987).

In June 1997, alarmed by the deterioration in Helmsley-Spear's ability to function as managing agent following the

death of Mr. Harry Helmsley, Mr. Malkin commenced this action seeking, *inter alia*, the removal of Helmsley-Spear as managing agent for these properties, as well as relief against Leona M. Helmsley, Mr. Helmsley's wife (R. 57, 65-70), who claimed to have succeeded to Mr. Helmsley's interest in the partnerships. Mr. Malkin also sought and received proxy votes from partners in several of the partnerships authorizing removal of Helmsley-Spear. On September 4, 1997, the Supreme Court, New York County granted respondent's motion to compel arbitration.

Later in September 1997, Mrs. Helmsley and Messrs. Irving Schneider and Alvin Schwartz, two longtime Helmsley-Spear executives, entered into a series of agreements resolving their own long-standing differences. Two aspects of these agreements present the central substantive issues of petitioners' lower court appeals: (1) Helmsley-Spear's undisclosed assignment of the contracts to manage these properties to a new entity called "Newco", subsequently renamed "Helmsley-Spear", without the knowledge or consent of the partnerships or Wien Malkin; and (2) Mrs. Helmsley's concealed grant of an irrevocable proxy to non-partner "Newco" to vote her general partner interest on the retention of Newco/Helmsley-Spear at eight of the partnership properties, including the Empire State Building (the "Helmsley Voting Agreement"). (R. 360-62).

The arbitration commenced in late 1997. Petitioners asserted, among other things, that Helmsley-Spear should be terminated as managing agent at all of the properties for cause; that certain partnerships validly had voted to terminate Helmsley-Spear without cause; that Mrs. Helmsley's wholesale transfer of her general partner voting rights to non-partner Newco was invalid under New York partnership law;

and that the undisclosed assignment of the property management contracts—which are personal services contracts, *e.g.*, *Security Pacific Mortgage & Real Estate Servs., Inc. v. Canadian Land Co.*, 690 F. Supp. 1214, 1221 (S.D.N.Y. 1988) (interpreting "a contract for the personal services of a managing agent")—was unlawful. Respondent filed counterclaims asserting that Wien Malkin had committed various ethical improprieties. (R. 95-98).

On March 30, 2001, three and one-half years after the proceeding began, the Arbitrators issued a 134-page "Partial/ Final Award". In pertinent part, the Award upheld the undisclosed assignment of the property management agreements to Newco, holding without any reasoning or citation to authority that this was a "technical matter" (R. 210). Moreover, though respondent itself had taken the position that "[u]nder Section 53(1) of the Partnership Law, a partner may not assign management rights", the Award nonetheless upheld the Helmsley Voting Agreement by which Mrs. Helmsley did just that; the practical effect of this ruling is to perpetuate Helmsley-Spear indefinitely as managing agent of several of New York's most significant commercial properties. (R. 214).

Petitioners promptly moved to vacate those sections of the Award, contending that the FAA should apply and that the challenged portions of the Award were in "manifest disregard" of clear, well-established law that was repeatedly cited to the Panel. Respondent cross-moved to confirm the Award. On July 23, 2001, the Supreme Court, New York County summarily confirmed the Award.

On appeal, petitioners argued both that the FAA should apply and that the Panel's holdings on these issues

should be vacated. In particular, petitioners noted that this dispute clearly implicated interstate commerce: (1) the parties themselves reside in different states (Mr. Malkin, for example, is a Connecticut resident and Helmsley-Spear is a New York corporation, (R. 458-459)); (2) the investors in the partnerships at issue were and are residents of many different states (*see e.g.*, R. 437 (North Carolina), 447 (New York), 454 (New Mexico), 490 (Virginia), 677 (New Jersey), 681 (Massachusetts), 685 (Florida), 693 (Connecticut), 697 (California), 708 (Vermont), 730 (New Hampshire)) and nations (United Kingdom—R. 636); (3) the partnership votes at issue were solicited and received from investors throughout the United States (*e.g.*, R. 437, 447, 454, 490, 677, 681, 685, 693, 697, 708, 730) and foreign countries (R. 636), using instrumentalities of interstate and foreign commerce; and (4) the dispute as a whole—relating as it does to Helmsley-Spear's efforts to lease office and showroom space in New York City to national and international tenants, to engage employees, services and supplies daily across a tri-state area, and to operate the Empire State Building observatory for several million annual visitors from around the globe—necessarily raised myriad issues directly affecting interstate commerce.

On December 5, 2002, the Appellate Division affirmed the lower court's judgment and confirmed the Award. Rejecting petitioners' argument that the FAA applied, the court held that "[I]nasmuch as the dispute at issue, arising from the termination of defendant as managing agent at buildings located within the City of New York, does not have a substantial effect on interstate commerce, the Federal Arbitration Act does not apply." (Appendix 1a). Accordingly, the court declined to consider whether the challenged aspects of the Award were in "manifest disregard of the law".

Rather, applying state law standards—which require a finding of outright irrationality before an arbitration award may be vacated—the court concluded that:

> [T]he arbitration panel's findings that the proxy solicitation process was impaired, that the Voting Agreement executed by Leona Helmsley did not violate Partnership Law § 53(1), and that the assignment to Newco was not an assignment of a personal services contract, *while perhaps questionable*, were not so arbitrary as to warrant vacatur.

Id. (emphasis added).

Petitioners timely applied for leave to appeal to the New York Court of Appeals. In their petition, petitioners again emphasized that the operation of these buildings unquestionably affects interstate commerce: the Empire State Building alone, for example, sells millions of tickets to national and international visitors every year and operates antenna and transmission facilities for television and radio programming across the tri-state area, while the International Toy Center has for decades been the principal location for the Annual American International Toy Fair, the largest event of its kind drawing thousands of buyers and sellers each year from around the world. Petitioners also noted that the Appellate Division had applied the wrong legal standard in determining whether to apply the FAA:

> The Appellate Division, however, held here, without elaboration, that "the dispute at issue . . . does not have a substantial effect on interstate commerce." Here, again, the Court misstated the

> applicable standard: the clear weight of authority holds that the reach of the FAA "extends to any contract affecting commerce", *not* only to those matters that have a "substantial effect on interstate commerce", and that to read the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995) as rejecting or modifying the clear holding of the *Allied-Bruce* case establishing the jurisdictional reach of the FAA, as the Appellate Division evidently did, is simply wrong.

(Petitioners' January 13, 2003 Memorandum of Law in Support of Motion for Leave to Appeal at 14.)

Petitioners also noted that the Appellate Division's failure to apply the correct standard to its review of the Award had real consequences, given the court's clearly expressed misgivings about the Award: the Appellate Division had attempted to clarify one particularly bizarre aspect of the Panel's holding—that that a principal owes a fiduciary duty to its agent—and noted that the Panel's other rulings were "perhaps questionable".

On April 8, 2003, the New York Court of Appeals denied petitioners' motion for leave to appeal.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

This petition should be granted for two reasons. *First*, as this Court recently confirmed in *Circuit City*, the Appellate Division misstated and misapplied Supreme Court precedent and therefore determined—erroneously—that the

FAA does not apply to this dispute. *Second*, as the balance of its decision demonstrates, the Appellate Division's error was almost certainly outcome determinative. The Court should remand this case so that the Appellate Division can determine whether the FAA applies using the correct legal standard, and, if so, whether the Award was made in manifest disregard of the law. *See New York Telephone Co. v. Communications Workers of America Local 1100*, 256 F.3d 89, 91 (2d Cir. 2001).

In *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (*per curiam*) (June 2, 2003), this Court expressly rejected the legal premise on which the Appellate Division based its refusal to apply the FAA: that the FAA only applies when the "relevant transactions . . . by themselves [] ha[ve] a 'substantial effect on interstate commerce'". 123 S. Ct. at 2039 (quoting *Alafabco, Inc. v. Citizens Bank*, 2002 WL 1998268 at * 3, *5 (Ala., Aug. 30, 2002)). The Supreme Court of Alabama had employed this standard based on its view that *United States v. Lopez*, 514 U.S. 549 (1995), required that "'a particular contract, in order to be enforceable under the Federal Arbitration Act must, by itself, have a substantial effect on interstate commerce.'" *Id.* (quoting *Alafabco, Inc. v. Citizens Bank* at * 11).

Noting the Alabama court's "improperly cramped view of Congress' Commerce Clause power", *id.* at 2041, this Court squarely rejected that view, holding that "*Lopez* did not restrict the reach of the FAA or implicitly overrule" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding that the FAA applies to written arbitration provisions in all transactions "affecting commerce"). *Id.* at 2040. Rather, the Court reiterated that:

> Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice . . . subject to federal control."

Id. (citations omitted). Applying this standard, the Court determined that the debt restructuring agreements at issue in *Citizens Bank* clearly "involv[ed] commerce", requiring the application of the FAA. *Id.*

In light of *Citizens Bank*, this Court would be fully justified in vacating the decision below and remanding with instructions to apply the FAA: it is difficult to see how the management and operation of eight million square feet of commercial property in New York City by partners located throughout the United States and foreign countries is not "involving commerce" within the meaning of the FAA. *Cf. Citizens Bank*, 123 S. Ct. at 2040 ("the Commerce Clause gives Congress the power to regulate local business establishments purchasing substantial quantities of goods that have moved in interstate commerce") (citing *Katzenbach v. McClung*, 379 U.S. 294 (1964)).

However, even if this Court permits the New York court to make that determination in the first instance, it is critically important that the Court vacate and remand the decision below, since the New York court's failure to apply the FAA was likely outcome determinative: as explained above, the Panel unblinkingly upheld both the unconsented assignment of personal services contracts and Leona Helmsley's undisclosed transfer of her general partner voting rights to an interested non-partner. The New York court recognized

that these holdings were "perhaps questionable" but held that they were not completely irrational, the applicable standard under New York law. Had the court applied the appropriate federal "manifest disregard of the law" standard, the court's own precedents likely would have compelled vacatur. *See, e.g., In re Arbitration Between UBS Warburg LLC and Auerbach, Pollack & Richardson, LLC*, 294 A.D.2d 245, 246, 744 N.Y.S.2d 364, 364 (1st Dep't 2002) (affirming vacatur of commercial arbitration award under FAA when "the arbitral panel manifestly disregarded the applicable law"); *In re Application of Spear, Leeds & Kellogg v. Bullseye Securities, Inc.*, 291 A.D.2d 255, 256, 738 N.Y.S.2d 27, 28 (1st Dep't 2002) (vacating commercial arbitration award under FAA when arbitration panel "exceeded its authority" and rendered award that was "inherently inconsistent"); *Stewart Tabori & Chang v. Stewart*, 282 A.D.2d 385, 386, 723 N.Y.S.2d 492, 494 (1st Dep't 2001) (vacatur of portion of award authorizing attorneys' fees and disbursements was proper on grounds that it was in "manifest disregard of well-defined, explicit and clearly applicable New York law").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT ENTERED DECEMBER 5, 2002

Williams, P.J., Ellerin, Rubin, Marlow, Gonzalez, JJ.

2467

Wien & Malkin, LLP, etc., et al.,

Plaintiffs-Appellants,

-against-

Helmsley-Spear, Inc.,

Defendant-Respondent.

Judgment, Supreme Court, New York County (Ira Gammerman, J.), entered July 23, 2001, which, inter alia, granted the motion by defendant Helmsley-Spear, Inc. to confirm an arbitration award dated March 30, 2001, unanimously affirmed, without costs.

Inasmuch as the dispute at issue, arising from the termination of defendant as managing agent at buildings located within the City of New York, does not have a substantial effect on interstate commerce, the Federal Arbitration Act does not apply (*see United States v Lopez*, 514 US 549, 559; *and see Allied-Bruce Terminix Cos. v Dobson*, 513 US 265, 281-282). Under state law, the award must stand unless shown to be utterly arbitrary or violative of public policy (*see* CPLR 7511; *Matter of Town of Callicoon v Civil Serv. Empls. Assn.*, 70 NY2d 907, 909).

Appendix A

We are not empowered to vacate an award merely for errors of law or fact committed by the arbitrators (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629). Given our very limited scope of review, we conclude that the arbitration panel's findings that the proxy solicitation process was impaired, that the Voting Agreement executed by Leona Helmsley did not violate Partnership Law § 53(1), and that the assignment to Newco was not an assignment of a personal services contract, while perhaps questionable, were not so arbitrary as to warrant vacatur. It may be noted in this connection that the arbitrators' finding that a "fiduciary duty" was owed by the partners to Helmsley-Spear appears not to have been a finding of the existence of such a duty in the strict legal sense, but only a determination that the parties' long-standing relationship warranted adherence to appropriate methodology before termination of Helmsley-Spear's role as managing agent for the various buildings could be effected.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 5, 2002

s/ Joseph M. Blackman
DEPUTY CLERK

APPENDIX B — JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK FILED JULY 23, 2001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 603145/97

IAS Part 27 (Gammerman, J.)

Case No. 12512

WIEN & MALKIN LLP as Supervisor and PETER L. MALKIN, individually and as Partner in and on behalf of EMPIRE STATE BUILDING ASSOCIATES, EMPIRE STATE BUILDING COMPANY, FIFTH AVENUE BUILDING ASSOCIATES, 200 FIFTH AVENUE ASSOCIATES, NAVARRE-500 BUILDING ASSOCIATES, 500-512 SEVENTH AVENUE ASSOCIATES, MARLBORO BUILDING ASSOCIATES 1359 BROADWAY ASSOCIATES, 112 WEST 34TH STREET ASSOCIATES, 112 WEST 34TH STREET COMPANY, SEVENTH AND THIRTY SEVENTY BUILDING ASSOCIATES, 501 SEVENTH AVENUE ASSOCIATES, 60 EAST 42ND STREET ASSOCIATES, LINCOLN BUILDING ASSOCIATES, 250 WEST 57TH STREET ASSOCIATES, FISK BUILDING ASSOCIATES, 1333 BROADWAY ASSOCIATES and 1400 BROADWAY ASSOCIATES,

Plaintiffs,

v.

HELMSLEY-SPEAR, INC.,

Defendant.

Appendix B

JUDGMENT

Defendant Helmsley-Spear, Inc., having moved this Court pursuant to CPLR § 7510, for an order (i) confirming the Partial/ Final Award issued in the arbitration proceedings between defendant Helmsley-Spear, Inc. and plaintiffs Wien & Malkin LLP and Peter L. Malkin (AAA Case Nos. 13 180 00976 97 and 13 180 00964 97), signed and verified on the 30th day of March, 2001 (the "Award") and (ii) directing that judgment be entered thereon; and plaintiffs having cross-moved for an order vacating paragraphs 2, 3, 4, 6, 9 and 10 of the Award and directing related relief; and the motion and cross-motion having come on to be heard at IAS Part 27 of this Court on June 18, 2001; and the Court having rendered its decision on the record as set forth in the certified transcript signed by the Court on June 25, 2001; and the motion to confirm having been granted and the cross-motion to vacate having been denied; and an order having been duly made by Justice Gammerman and entered in the office of the Clerk of this Court on June 20, 2001; and an order directing the entry of judgment having been duly made by Justice Gammerman on July 12, 2001; and defendant having waived the recovery of costs and disbursements;

NOW, on motion of Baer Marks & Upham LLP and Squadron Ellenoff Plesent & Sheinfeld LLP, attorneys for defendant, it is

Appendix B

ADJUDGED that the Award, a copy of which is annexed hereto and incorporated herein by reference, be and the same hereby is confirmed, as follows:

1. The claims of Wien & Malkin LLP and Peter Malkin ("Plaintiffs") to remove Helmsley-Spear, Inc. ("Defendant" or "Helmsley-Spear") as managing agent for cause are denied.

2. The claims of Plaintiffs to remove Defendant as managing agent without cause are denied.

3. The proxies heretofore solicited and obtained by Plaintiffs with a view to using such proxies in any vote to remove Defendant as managing agent for any of the Properties (as that term is defined in the Memorandum of the Arbitrators dated March 30, 2001 [the "memorandum"]) are declared to be null, void and of no effect.

4. All votes or purported votes to terminate Defendant as managing agent for any of the Properties are declared to be null, void and of no effect.

5. All other claims of Plaintiffs including all claims for damages against Defendant are denied.

6. Defendant is declared to be in all respects the legal and valid successor in interest to the former Helmsley-Spear Corporation and to have validly exercised the Option Agreement of 1970 (as that term is described in the memorandum).

Appendix B

7. Defendant is declared to be a third-party beneficiary of all of the partnership agreements involved in this proceeding.

8. It is found and declared that valid action by each partnership in accordance with its respective partnership agreement is required to remove Defendant as managing agent.

9. Plaintiffs are enjoined from contesting the validity or in any way interfering with the Voting Agreement between Leona Helmsley and Helmsley-Spear, dated September 24, 1997, and Plaintiffs are ordered to give full force and effect to that agreement in any future vote to remove Defendant as managing agent.

10. Plaintiffs are enjoined from calling and holding a partnership meeting for the purpose of removing Defendant as managing agent or from soliciting proxies for use for such purpose unless the following procedures are followed:

    (a) Wien & Malkin shall prepare and deliver to Defendant the appropriate proxy material which must be complete and accurate in all respects and consistent with the findings and conclusions of the memorandum at least 180 days prior to the date of any such meeting;

    (b) Defendant shall have 15 days from receipt of the proposed proxy material to request clarification or additional information and 30

days from receipt of the responses to its requests to object to the proxy material;

(c) The parties shall thereafter attempt, in good faith, for a period of 15 days to resolve any objections made by Defendant;

(d) In the event the parties are unable to resolve such objections and disputes, any differences will be submitted to the arbitrators who rendered the memorandum and Award (the "Panel"). The Panel shall, on the basis of the Panel's memorandum and any written submissions made by the parties (without receipt of any additional affidavits, depositions or additional testimony, unless ordered by the Panel for good cause shown), order such changes in the proposed proxy material as may be appropriate.

(e) Wien & Malkin shall cause the proxy material to be sent to all general partners and all other persons entitled to vote at such meeting of any affected partnership at least 60 days prior to the date of any such meeting. At the same time, it shall furnish to Defendant, the names and addresses of all such general partners.

(f) Defendant may produce counter proxy material, which will be subject to the same requirements and procedures as provided in subparagraphs (a) - (d). Defendant shall cause the counter proxy

material to be sent to the persons described in subparagraph (e) at least 30 days prior to the date of such meeting.

(g) Defendant shall be entitled, through its officers, employees, agents and/or attorneys, to attend each such meeting and to participate.

(h) The Panel retains jurisdiction of this dispute for a period of one year from the date of the Award solely for the purposes of this paragraph 10.

(i) If within 30 days of the date of the Award any party objects in writing to the American Arbitration Association to the Panel's retaining jurisdiction pursuant to the preceding subparagraph (h), then subparagraphs (d) and (h) shall be deemed deleted from this paragraph 10.

(j) The time periods specified in this paragraph can be extended by agreement of the parties, by the Panel, if the Panel retains jurisdiction, or if not, by any other competent tribunal.

(k) Except as set forth in the memorandum, the Panel makes no findings with respect to the form or content of any proxy material or counter proxy material to be prepared pursuant to this paragraph.

Appendix B

11. Subparagraphs (d) and (h) of paragraph 10 are deemed deleted by virtue of the April 2, 2001 letter from Plaintiffs' counsel to the American Arbitration Association objecting, pursuant to paragraph 10(i) of the Award, to the Panel's retaining jurisdiction pursuant to paragraph 10(h) of the Award.

12. All claims for attorney's fees are denied.

13. Plaintiffs' claim for punitive damages is denied.

14. The compensation of the Panel shall be borne equally by Plaintiffs and Defendant.

15. The fees of the American Arbitration Association shall be borne equally by the parties.

16. Except as specifically awarded herein, all other counterclaims of Defendant are denied.

17. All other claims of all parties are denied.

18. The Award is in full settlement of all claims submitted.

Judgment signed and entered this 23 day of July, 2001.

s/ Norman Goodman
Clerk

APPENDIX C — PARTIAL/FINAL AWARD

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance the the arbitration agreements entered into between the above named parties and having been duly sworn, and having duly heard the proofs and allegations of the parties, and for the reasons set forth above, do hereby AWARD as follows:

1. The claims of Wien & Malkin LLP and Peter Malkin ("Claimants") to remove Helmsley-Spear, Inc. ("Respondent" or "Helmsley-Spear") as managing agent for cause are denied.

2. The claims of Claimants to remove Respondent as managing agent without cause are denied.

3. The proxies heretofore solicited and obtained by Claimants with a view to using such proxies in any vote to remove Respondent as managing agent for any of the Properties are declared to be null, void and of no effect.

4. All votes or purported votes to terminate Respondent as managing agent for any of the Properties are declared to be null, void and of no effect.

5. All other claims of Claimants including all claims for damages against Respondent are denied.

6. Respondent is declared to be in all respects the legal and valid successor in interest to the former Helmsley-Spear Corporation and to have validly exercised the Option Agreement of 1970.

Appendix C

7. Respondent is declared to be a third-party beneficiary of all of the partnership agreements involved in this proceeding.

8. We find and declare that valid action by each partnership in accordance with its respective partnership agreement is required to remove Respondent as managing agent.

9. Claimants are enjoined from contesting the validity or in any way interfering with the Voting Agreement between Leona Helmsley and Helmsley-Spear, dated September 24, 1997 and Claimants are ordered to give full force and effect to that agreement in any future vote to remove Respondent as managing agent.

10. Claimants are enjoined from calling and holding a partnership meeting for the purpose of removing Respondent as managing agent or from soliciting proxies for use for such purpose unless the following procedures are followed:

    (a) Wien & Malkin shall prepare and deliver to Respondent the appropriate proxy material which must be complete and accurate in all respects and consistent with the findings and conclusions of this memorandum at least 180 days prior to the date of any such meeting;

    (b) Helmsley-Spear shall have 15 days from receipt of the proposed proxy material to request

clarification or additional information and 30 days from receipt of responses to its requests to object to the proxy material;

(c) The parties shall thereafter attempt, in good faith, for a period of 15 days to resolve any objections made by Helmsley-Spear;

(d) In the event the parties are unable to resolve such objections and disputes, any differences will be submitted to the Panel. The Panel shall, on the basis of the Panel's memorandum and any written submissions made by the parties (without receipt of any additional affidavits, depositions or additional testimony, unless ordered by the Panel for good cause shown), order such changes in the proposed proxy material as may be appropriate.

(e) Wien & Malkin shall cause the Proxy material to be sent to all general partners and all other persons entitled to vote at such meeting of any affected partnership at least 60 days prior to the date of any such meeting. At the same time, It shall furnish to Respondent the names and addresses of all such general partners.

(f) Respondent may produce counter proxy material, which will be subject to the same requirements and procedures as provided in subparagraphs (a)-(d). Respondent shall cause the counter proxy material to be sent to the

persons described in subparagraph (e) at least 30 days prior to the date of such meeting.

(g) Respondent shall be entitled, through its officers, employees, agents and/or attorneys, to attend each such meeting and to participate.

(h) The Panel retains jurisdiction of this dispute for a period of one year from the date of the award solely for the purposes of this paragraph 10.

(i) If within 30 days of the date of this award any party objects in writing to the American Arbitration Association to the Panel's retaining jurisdiction pursuant to the preceding subparagraph (h), then subparagraphs (d) and (h) shall be deemed deleted from this paragraph 10.

(j) The time periods specified in this paragraph can be extended by agreement of the parties, by this Panel, if we retain jurisdiction or if not, by any other competent tribunal.

(k) Except as set forth in the preceding memorandum, we make no findings with respect to the form or content of any proxy material or counter proxy material to be prepared pursuant to this paragraph.

11 All claims for attorney's fees are denied.

12. Claimants' claim for punitive damages is denied.

13. The compensation of the arbitrators shall be borne

equally by the Claimants and the Respondent.

14. The fees of the American Arbitration Association shall be borne equally by the parties.

15. Except as specifically awarded herein, all other Counterclaims of Respondent are denied.

16. All other claims of all parties are denied.

17. This Award is in full settlement of all claims submitted.

s/ William L. D. Barrett 3/30/01
William L. D. Barrett, Esq. /dated

Nicholas deB. Katzenbach, Esq. /dated

s/ John H. Wilkinson 3/30/01
John H. Wilkinson, Esq. /dated

APPENDIX D — ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS DENYING MOTION FOR LEAVE TO APPEAL DATED APRIL 8, 2003

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of April 2003

Present, HON. GEORGE BUNDY SMITH, *Senior Associate Judge, presiding.*

1-10

Mo. No. 70

Wien & Malkin, LLP, &c., et al.,

Appellants,

v.

Helmsley-Spear, Inc.,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix D

ORDERED, that the said motion be and the same hereby is denied. Chief Judge Kaye took no part.

s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court